

The Service-Disabled Veteran-Owned Small Business in the Federal Marketplace

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*The willingness with which our young people are likely to serve in any war, no matter how justified, shall be directly proportional to how they perceive the veterans of earlier wars were treated and appreciated by our nation.*¹

I. Introduction

Since 2001, more than 35,000 American servicemen and women have been wounded in combat around the globe.² In addition to the combat wounded, other members of the armed forces have incurred injuries while in the line of duty.³ Annually, the defense disability system handles about 20,000 new compensation and pension claims.⁴ Many of these veterans are eligible for status as service-disabled.⁵

In recognition of the sacrifices of service-disabled veterans, Congress passed legislation to assist them in entering the federal marketplace as small business owners and operators.⁶ More specifically, Congress shaped a legislative framework that provides a competitive advantage to these veterans in federal contracting.⁷ The law puts into place a goal for federal agencies to annually award at least 3% of all procurement dollars to small business concerns owned and operated by service-disabled veterans.⁸ Unfortunately, government agencies continually fail to meet the 3% goal, even though contracting officers have the tools required to administer the program.⁹ To comply with Congress' intent, agency procurement officials must increase contracting opportunities for service-disabled veteran-owned small businesses.¹⁰

This article will introduce agency heads, contracting officers, Judge Advocates, and veterans to the laws and programs designed to assist service-disabled veteran-owned small businesses in federal contracting. To accomplish this goal, the first

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¹ Paul Chevalier, *Veteran Support for McCain*, HUDSON-LITCHFIELD NEWS, Apr. 20, 2007, available at <http://www.johnmccain.com/Informing/News/NewsReleases> (quoting Sen. John McCain who quoted General George Washington during a campaign speech in New Hampshire in the spring of 2007).

² U.S. DEP'T OF DEFENSE, DEFENSELINK, OIF/OEF CASUALTY REPORT, <http://www.defenselink.mil/news/casualty.pdf> (last visited June 18, 2008).

³ Rudi Williams, *Veterans Affairs Strives to Find Jobs for Iraq, Afghanistan War Vets*, AM. FORCES PRESS SERV., Oct. 13, 2005, <http://www.defenselink.mil/news>.

⁴ Jim Garamone, *Defense-VA Team Proposes Disability Process Changes*, AM. FORCES PRESS SERV., Oct. 23, 2007, available at <http://www.defenselink.mil/news/newsarticle.aspx>.

⁵ 38 U.S.C. § 101(16) (2000) (stating that a veteran is considered to have a service-connected disability after the Department of Veteran Affairs has determined that he incurred an injury while serving on active duty, or that the disability was aggravated, in line of duty in the active military, naval, or air service).

⁶ Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233; see Veterans Benefit Act of 2003, Pub. L. No. 108-183, 117 Stat. 2662 (codified at 15 U.S.C. § 657f); see also Veterans Benefit, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403.

⁷ 38 U.S.C. § 8127(c), (d) (permitting contracting officer to conduct competitive set-asides or sole-source procurements for service-disabled veteran-owned small businesses).

⁸ Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233; see Veterans Benefit Act of 2003, Pub. L. No. 108-183, 117 Stat. 2662 (codified at 15 U.S.C. § 657f); see also Veterans Benefit, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403.

⁹ Memorandum from Angela B. Styles, Administrator, U.S. Office of Mgmt. & Budget, to Heads of Departments and Agencies, subject: Participation of Veterans in Federal Contracting (Apr. 29, 2003) [hereinafter Styles Memo], available at <http://www.whitehouse.gov/omb/memoranda/m03-11.html>.

¹⁰ H.R. 5583, 107th Cong. (2002).

section of this article presents a summary of the laws intended to assist service-disabled veteran-owned small businesses. Following that discussion, section two focuses on socio-economic programs and eligibility requirements. Section three is a review of common procedural issues affecting service-disabled veteran-owned businesses. Section four explores policy conflicts that may impact contract awards to a service-disabled veteran-owned small business. Section five summarizes the role that federal agencies, quasi-government organizations, and industries play to meet the 3% goal. Finally, this article concludes with recommendations to increase contract awards to service-disabled veteran-owned small businesses.

II. Laws Designed to Assist Service-Disabled Veteran-Owned Small Businesses

Years prior to the conflicts in Afghanistan and Iraq, Congress recognized the sacrifices that men and women in uniform make when they join the armed services.¹¹ In 1974, it created a legislative framework to assist service-disabled veterans in federal contracting.¹² Unfortunately, over the next twenty-five years, Congress did not pass any significant legislation to assist them with entry into the federal acquisition field.¹³ The status quo finally changed in 1999 when the 106th Congress passed the Veterans Entrepreneurship and Small Business Development Act.¹⁴ As background to this discussion, the following section explores the laws intended to assist service-disabled veteran-owned businesses.

A. The Veterans Entrepreneurship and Small Business Development Act

The Veterans Entrepreneurship and Small Business Development Act (VESBD Act) established a goal for all federal agencies to annually award no less than 3% of all contracts to small business concerns owned and operated by service-disabled veterans.¹⁵ In the years immediately following its enactment, the VESBD Act was largely ignored.¹⁶ Federal agencies, such as the Department of Defense, have spent billions of dollars in their procurement programs; however, only a small fraction of dollars were awarded as contracts to service-disabled veteran-owned business concerns.¹⁷

To explain this failure, agency procurement officials contended that they lacked an effective means by which to implement the law.¹⁸ To satisfy Congress's intent, the officials advocated for contracting methods to restrict competition exclusively among service-disabled veteran-owned businesses.¹⁹ The proposed solution included the use of contracting methods such as competitive set-asides and sole-source contracts.²⁰

Unfortunately, the VESMD Act lacked any of the tools necessary to meet Congress's goal, and the status quo of the previous twenty-five years remained.²¹ The goal—to award at least 3% of all federal contracts to service-disabled veteran-owned small businesses—would remain elusive.²² In 2003, the situation improved only slightly when Congress passed additional legislation as an attempt to remedy the problem.²³

¹¹ *Veteran-Owned Business History*, VETERAN'S BUS. J., Apr. 2007, at 12–13 [hereinafter *Veteran-Owned Business History*] (providing a timeline of initiatives designed to assist veterans in federal contracting).

¹² *Id.* In 1974, Congressman Edward Koch introduced legislation requiring the Small Business Administration to provide veterans with special consideration in federal contracting. *Id.* at 12.

¹³ *See id.* at 12–13.

¹⁴ Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233.

¹⁵ *Id.*

¹⁶ Styles Memo, *supra* note 9.

¹⁷ U.S. Dep't of Defense, Office of Small Bus. Programs, *Department of Defense Program Goals & Statistics*, <http://www.acq.osd.mil/osbp/statistics/goals.htm> (last visited June 17, 2008) [hereinafter *DOD Goals & Stats.*].

¹⁸ Styles Memo, *supra* note 9.

¹⁹ *Id.*

²⁰ *Service-Disabled Veterans' Small Business Federal Procurement Preference Act: Hearing on H.R. 5583 Before the H. Comm. on Veterans Affairs*, 107th Cong. E1804–05 (2002) (statement of Rep. Lance Evans, Ranking Democratic Member, Comm. on Veterans Affairs).

²¹ *DOD Goals & Stats.*, *supra* note 17.

²² Veterans Benefit Act of 2003, Pub. L. No. 108-183, 117 Stat. 2662 (codified at 15 U.S.C. § 657f).

²³ *Id.*

B. The Veterans Benefit Act

In response to the failure of federal agencies to meet the 3% goal, the 108th Congress passed the Veterans Benefit Act (VB Act) of 2003.²⁴ The VB Act not only restated Congress's original intent to assist service-disabled veterans in federal contracting, but it also provided mechanisms to meet the law's objectives.²⁵ The law authorized contracting officers to conduct competitive contract set-asides and sole-source procurements among service-disabled veteran-owned small businesses.²⁶ Despite changes to the law, federal agencies still failed to achieve the 3% goal.²⁷ To reinforce Congress's commitment to assist service-disabled veterans, President Bush signed an executive order the next year.²⁸

C. Executive Order 13,360

On 20 October 2004, the President signed Executive Order 13,360.²⁹ The order provided much-needed direction and a clear mandate to the heads of federal agencies.³⁰ Agency officials no longer could ignore the legislative framework that Congress created to assist service-disabled veteran-owned businesses.³¹ In the order, the President outlined the respective roles for the Administrator of the Small Business Administration, Administrator of the General Services Agency, Secretary of Defense, Secretary of Veterans Affairs, and Secretary of Labor.³² The President also directed all federal agency heads to develop a "strategic plan" to implement the policies as prescribed by Congress.³³ In the years immediately following the executive order the number of contracts awarded to service-disabled veteran-owned small businesses increased, but at a sluggish rate. The slow growth prompted further congressional direction.³⁴

D. The Veterans Benefit, Health Care, and Information Technology Act

In December 2006, Congress passed the Veterans Benefit, Health Care, and Information Technology Act (VBHCIT Act).³⁵ The law placed an emphasis on a "veterans first" approach to contracting within the Department of Veterans Affairs.³⁶ Unlike other socio-economic programs that give no preference to veteran-only status, the VBHCIT Act authorizes

²⁴ *Id.*

²⁵ *Id.* Contracting officers were exempt from the full and open competition requirements if at least two responsible service-disabled veteran-owned small businesses were expected to bid on a contract. *Id.*

²⁶ *Id.* Sole source procurements may be awarded up to \$5 million for manufacturing contracts and up to \$3 million for non-manufacturing contracts. *Id.*; see also ACTIVITIES REPORT OF THE COMMITTEE ON VETERAN'S AFFAIRS FOR THE 109TH CONGRESS, H.R. REP. No. 109-737 (2006).

²⁷ *DOD Goals & Stats.*, *supra* note 17.

²⁸ Exec. Order No. 13,360, 69 Fed. Reg. 206 (Oct. 26, 2004); see also 13 C.F.R. 125.19, 125.20 (2004).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

The Administrator of the Small Business Administration was directed to assist heads of agencies to implement the executive order and to coordinate with the Veterans Affairs Center for Veterans Enterprise to provide to service-disabled veteran-owned businesses information, assistance and training in Federal contracting law, procedures and practices; the Administrator of the General Services Agency was directed to establish a Government-wide Acquisition Contract reserved for service-disabled businesses and to include these businesses in the Federal Supply Schedule; the Secretary of Defense was directed to direct the Defense Acquisition University to develop training programs for service-disabled businesses and to make this training available on-line; the Secretary of Veterans Affairs was directed to assist the Veterans Affairs Center for Veterans Enterprise in verifying the accuracy of the service-disabled veteran contractor registration databases; and finally, the Secretary of Labor and the Secretary of Veterans Affairs were directed to ensure that veterans leaving the service were made aware of the benefits available to service-disabled veteran-owned businesses and the potential entrepreneurial opportunities.

Id.

³³ *Id.*

³⁴ *DOD Goals & Stats.*, *supra* note 17.

³⁵ Veterans Benefit, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403.

³⁶ Information Letter from C. Ford Heard, Dir., Dep't of Veterans Affairs, Office of Acquisition and Material Mgmt., to Under Secretaries for Health, Benefits, and Memorial Affairs et.al., subject: Veterans First Contracting Program, (June 19, 2007) [hereinafter Heard Letter] (on file with author)

the Department of Veterans Affairs to provide a preference to both veteran-owned and service-disabled veteran-owned small businesses.³⁷ Specifically, the law enables contracting officers from the Department of Veterans Affairs to include veteran and service-disabled veteran small business status as an evaluation factor in competitively negotiated solicitations.³⁸ The net effect of the change is to alter the contracting priority within the socio-economic programs managed by the Department of Veterans Affairs.³⁹ To fully understand how this and other recent changes affect service-disabled veteran-owned small businesses, Section III provides a basic understanding of these programs.

III. Socio-Economic Programs

Congress created small business programs to encourage the development of business within certain socio-economic groups.⁴⁰ To give qualified small businesses the ability to compete with larger and more established organizations, Congress passed laws to provide low interest loans, business development assistance, counseling, training, and contract preferences.⁴¹ Qualifying businesses include firms owned and operated by service-disabled veterans, firms located within qualified historically underutilized business zones (HUBZones), firms owned and operated by the socially and economically disadvantaged, and firms owned and operated by women.⁴² To understand the impact that socio-economic programs have on service-disabled veteran-owned small businesses, the next section examines several of the programs.⁴³

A. Service-Disabled Veteran-Owned Small Business Program

Congress provided service-disabled veterans a preference in government contracting in recognition of their service to the country.⁴⁴ To aid federal agencies in determining who qualifies for status as a “service-disabled veteran,” Congress designated the Department of Veterans Affairs as its lead agency.⁴⁵ As a general rule, a veteran is any person who served on active duty in the armed forces, and has completed his or her service under honorable conditions.⁴⁶ Therefore, a service-disabled veteran is an American serviceman or woman who incurred an injury, or aggravated a pre-service condition, while in the line of duty.⁴⁷

(providing guidance to contracting officers concerning the award of contracts to service-disabled veteran-owned small businesses and veteran-owned small businesses in accord with Veterans Benefit, Health Care, and Information Technology Act).

³⁷ See Veterans Benefit, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403.

³⁸ See Heard Letter, *supra* note 36.

³⁹ *Id.* For socio-economic programs managed by the Department of Veteran Affairs, set-aside preferences for awarding contracts to small business concerns shall be applied in the following order of priority: (1) service-disabled veteran-owned small businesses; (2) veteran-owned small businesses; (3) Section 8(a) or HUBZone business program; and, (4) any other small business contracting preference. *Id.*

⁴⁰ *Adarand Constructors Inc. v. Pena*, 515 U.S. 200 (1995).

⁴¹ GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 19.202-2 (July 2007) [hereinafter FAR] (stating that a contracting officer must, to the extent practicable, encourage maximum participation by small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns in acquisitions).

⁴² *Id.* pt. 19.201(a).

⁴³ 13 C.F.R. § 125.13 (2007) (stating 8(a) Program participants, HUBZone, Small Disadvantaged, and Women-Owned small businesses may also qualify as “Service-Disabled Veteran-Owned” if they can meet the requirements of those other programs).

⁴⁴ See 38 U.S.C. § 101, 101(2) (2000); see also U.S. Dep’t of Defense, Office of Small Bus. Programs, Frequently Asked Questions, <http://www.acq.osd.mil/osbp/programs/veterans/faq.htm> (last visited Jan. 14, 2008) [hereinafter DOD, Frequently Asked Questions].

⁴⁵ See 38 U.S.C. § 101, 101(2); see also DOD, Frequently Asked Questions, *supra* note 44 (stating to be considered a service-disabled, the veteran must have an adjudication letter from the Department of Veterans Affairs).

⁴⁶ See FAR, *supra* note 41, pt. 19.1401(a); see also 38 U.S.C. §101, 101(2); DOD, Frequently Asked Questions, *supra* note 44 (stating a veteran is any former member of the armed forces who was discharged or released from duty under any conditions other than dishonorable, as well as active and former members of the Reserve and National Guard).

⁴⁷ See 38 U.S.C. § 101(2), (16); see also DOD, Frequently Asked Questions, *supra* note 44.

The term “service-connected” means, with respect to disability or death, that such disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in line of duty in the active military, naval, or air service. . . . A veteran with a 0 to 100 percent disability rating is eligible to self-represent himself as service-disabled for the purpose of federal contracting.

Id.

A business concern is considered “service-disabled veteran-owned,” if the disabled veteran’s ownership interest is “unconditional and direct.”⁴⁸ Regulations require that the veteran must be actively involved in the daily operation of the business, and his or her control must be “direct and substantial.”⁴⁹ Additionally, the service-disabled veteran must hold the highest position in the company and possess experience commensurate with that role.⁵⁰ Typically, a business is designated as “small” when its gross receipts are not in excess of an amount predetermined by the Commerce Department.⁵¹ Only when all of these preconditions have been fulfilled may a small business be eligible for status as service-disabled veteran-owned.⁵² Once qualified, a service-disabled veteran-owned small business may also be eligible for additional status under the terms of other socio-economic programs, thus potentially availing itself to additional contract preferences.⁵³ A program that almost all service-disabled veteran-owned small businesses may qualify for is the HUBZone Program.⁵⁴

B. HUBZone Program

In 1997, Congress created the HUBZone Empowerment Contracting Program,⁵⁵ to encourage economic development in areas of the country where it has not traditionally occurred.⁵⁶ This socio-economic program is one for which many service-disabled veteran-owned small businesses may gain an additional status simply by locating its business in a qualifying area. To achieve HUBZone status, a service-disabled veteran-owned small business must certify to the Small Business Administration that it is actually located within HUBZone and at least 35% of its employees reside in *any* HUBZone.⁵⁷ Contracting preferences available to a certified HUBZone small business include competitive set-asides,⁵⁸ sole source procurements,⁵⁹ and price evaluations.⁶⁰

Although qualified as a HUBZone small business, several statutory exemptions may limit the usefulness of enrollment into the program.⁶¹ These exemptions can effectively negate any practical contracting advantage gained by the service-disabled veteran who locates his business within a qualifying HUBZone.⁶² This consideration should not however be the determining reason not to locate a small business within a qualifying HUBZone. Practical advantages of locating a small

⁴⁸ See 13 C.F.R. § 125.9 (2008); see also DOD, Frequently Asked Questions, *supra* note 44 (stating the business concern must be 51% “unconditionally and directly” owned by one or more service-disabled veterans, or in the case of any publicly owned business, not less than 51% of the stock of the company is owned by one or more service-disabled veterans).

⁴⁹ See 13 C.F.R. § 125.9 (stating the management and daily business operations must be controlled by one or more service-disabled veterans, or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran).

⁵⁰ *Id.* § 125.10; see also SDV Solutions, Inc. re: Four Points Tech., LLC., Small Bus. Admin. Office of Hearings and Appeals, SBA VET-116 (29 June 2007) (finding that service-disabled veteran lacked the managerial experience to qualify for status as a service-disabled veteran-owned small business).

⁵¹ See *Advanced Sys. Tech., Inc. v. United States*, 69 Fed. Cl. 474, 475 n.1 (2006) (citing 13 C.F.R. §§ 121.101, 121.402 (2006)). “North American Industry Classification System (NAICS) Codes are used by government agencies and the Small Business Administration to establish size standards governing eligibility for small business preferences under government programs and procedures.” *Id.*

⁵² 38 U.S.C. § 101 (2000).

⁵³ 13 C.F.R. § 125.13 (“8(a) Program participants, HUBZone, Small Disadvantaged, and Women-Owned small businesses may also qualify as “Service-Disabled Veteran-Owned” if they can meet the requirements of those other programs.”).

⁵⁴ FAR, *supra* note 41, pt. 19.1301.

⁵⁵ See Small Business Reauthorization Act of 1997, Pub. L. No. 105-135, 111 Stat. 2592, 2617–20.

⁵⁶ FAR, *supra* note 41, pt. 19.1303.

⁵⁷ See Small Business Reauthorization Act of 1997, 111 Stat. at 2617–20 (defining “qualifying areas” on the basis of census data).

⁵⁸ FAR, *supra* note 41, pt. 19.305.

⁵⁹ *Id.* pt. 19.306.

⁶⁰ *Id.* pt. 19.305.

⁶¹ *Id.* pt. 19.304.

This [FAR] subpart (HUBZone) does not apply when the requirements can be satisfied through contracts awarded to: (1) Federal Prison Industries, Inc.; (2) Non-profit agencies for the blind or severely disabled participating under the Javits-Wagner-O’Day Act; (3) Orders under indefinite delivery contracts; (4) Orders against Federal Supply Schedules; (5) Requirements currently being performed by an 8(a) participant or requirements SBA has accepted for performance under the authority of the 8(a) Program, unless SBA has consented to release the requirements from the 8(a) Program; (6) Requirements that do not exceed the micro-purchase threshold; and, (7) Requirements for commissary or exchange resale items.

Id.

⁶² *Id.* pt. 19.1303.

business within a qualifying area include lower rent or property costs, tax exemptions or credits, an available workforce, development of good will within the community, and possible qualification for other socio-economic programs.⁶³ As an example, a service-disabled veteran located within a HUBZone may also qualify as a Small Disadvantaged Business.⁶⁴

C. Small Disadvantaged Business Certification Program

Small business owners who are members of a socially⁶⁵ or economically disadvantaged group⁶⁶ may be eligible for disadvantaged business status under the Small Disadvantaged Business Certification Program.⁶⁷ Under this program's umbrella, qualified individuals are encouraged to create a small business.⁶⁸ If a service-disabled veteran can demonstrate that he can meet all requirements of a small disadvantaged business, he may be eligible to receive "small disadvantaged certification" from the Small Business Administration.⁶⁹ Once certified, the disabled-veteran may then be eligible for contract preferences as both a small disadvantaged business and a service-disabled veteran-owned small business.⁷⁰

For the service-disabled veteran, the additional status of being a small disadvantaged business may not provide further benefits.⁷¹ For instance, if a contract award is based solely on the small disadvantaged business status, contracting officers are precluded from giving any preference to small disadvantaged businesses in section 8(a) acquisitions,⁷² in any negotiated acquisitions when the lowest technically acceptable source selection process is used,⁷³ and in contract actions where performance will occur outside of the United States.⁷⁴ Finally, the Small Disadvantaged Business Certification Program is distinctly different from the Women-Owned Small Business Program.

D. Women-Owned Small Business Program

In 1994, Congress created the Women-Owned Small Business Program⁷⁵ which set a goal for federal agencies to award at least 5% of all government acquisitions to woman-owned small businesses.⁷⁶ On its face, the program appeared to increase business opportunities for women,⁷⁷ however, executive agencies failed to reach that goal.⁷⁸ The difficulties women-owned

⁶³ See Small Business Reauthorization Act of 1997, Pub. L. No. 105-135, 111 Stat. 2592, 2617-20 (encouraging business development in socially and economically depressed areas).

⁶⁴ 13 C.F.R. § 124.105 (2008) (defining the net worth of the individual claiming disadvantage must be less than \$750,000).

⁶⁵ *Id.* § 124.103(a) (defining socially disadvantaged persons as people who have been subjected to racial or ethnic prejudice or cultural bias with American society because of their identities as members of groups and without regard to their individual qualities).

⁶⁶ *Id.* § 124.104(a) (defining economically disadvantaged individuals as socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged).

⁶⁷ *Id.* § 124.1002.

⁶⁸ *Id.* § 124.105 (stating that a participant in the program must be at least 51% unconditionally and directly owned by one or more socially and economically disadvantaged individual who are citizens of the United States).

⁶⁹ See *id.* § 124.1001 (giving general requirements for the small disadvantaged business certification program); see also *id.* § 124.1014 (stating small disadvantaged business certification program status is generally valid for three years).

⁷⁰ FAR, *supra* note 41, pt. 19.1202-4; see also *id.* 19.1201. "Small disadvantaged business status may be used as an evaluation factor in competitive, negotiated acquisitions." *Id.* "Contracting officers should be aware that under the 8(a) program all businesses should be considered as small disadvantaged businesses." *Id.*

⁷¹ *Id.* pt. 19.1202-2.

⁷² See 13 C.F.R. § 124.105 (2008) (stating for section 8(a) contracting eligibility the net worth of the individual claiming disadvantage must be less than \$250,000).

⁷³ FAR, *supra* note 41, pt. 19.1202-2.

⁷⁴ *Id.*

⁷⁵ See Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243; see also Policy Letter 99-1, Off. of Mgmt & Budget, Off. of Fed. Pol'y, subject: Government-Wide Small Business, HUBZone Small Business, Small Disadvantaged Business, and Women-Owned Small Business Goals for Procurement Contracts (29 Mar. 1999), available at <http://www.whitehouse.gov/omb/fedreg/pp99-1.html>.

⁷⁶ *Id.*

⁷⁷ Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355 108 Stat. 3243.

small businesses face appear very similar to those affecting service-disabled veteran-owned small businesses.⁷⁹ In both instances, the laws failed to provide procurement officials with the contracting tools to meet the Congressional mandate.⁸⁰

To rally support for the program, in 2000 President Clinton issued Executive Order 13,157.⁸¹ The President urged federal agencies to meet the 5% contracting goal and develop a long-term comprehensive strategy to expand opportunities for woman-owned small businesses.⁸² The order had minimal effect, as federal agencies continue to fall short of the stated goal.⁸³ Lack of contracting authority and other procedural roadblocks continue to be the likely reasons for failure.⁸⁴ The law encourages, but does not require, contracting officers to award contracts to woman-owned small businesses.⁸⁵ At the present day, Congress has not taken any corrective action with respect to the woman-owned small businesses program.⁸⁶ Therefore, a woman-owned, service-disabled veteran-owned small business may not realize any advantage based solely on its status as woman-owned.

IV. Procedure

In addition to many regulations that a small business must comply with to qualify for status under a socio-economic program, there are also numerous procedural issues to consider.⁸⁷ To help small businesses, Congress designated both the Small Business Administration; and the Office of Small Business Programs, under the Department of Labor, as lead agencies.⁸⁸ The Small Business Administration is an independent federal agency designed to protect the interests of businesses meeting certain size requirements.⁸⁹ The Office of Small Business Programs administers the Department of Labor's socio-economic programs.⁹⁰ These agencies together are responsible for ensuring that procedures are followed and small businesses receive a fair proportion of federal contracts for supplies and services.⁹¹ When competing for agency contracts, service-disabled veteran-owned businesses may commonly encounter procedural issues such as status, responsibility determinations, and protests.

⁷⁸ *DOD Goals & Stats.*, *supra* note 17 (finding from 1994 through 1999 the Department of Defense never awarded more than a 2% of its contracts to woman-owned small business).

⁷⁹ Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233 (The Act lacked any meaning method for contracting officers to direct federal contracts towards service-disabled veteran-owned businesses).

⁸⁰ *See id.*; *see also* Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243.

⁸¹ Exec. Order No. 13,157, 3 C.F.R. 272 (2000).

[T]he executive branch shall implement this policy by establishing a participation goal for [woman-owned small businesses] of not less than 5 percent of the total value of all prime contract awards for each fiscal year and of not less than 5 percent of the total value of all subcontract awards for each fiscal year.

Id. at 273.

⁸² *Id.*

⁸³ *DOD, Goals & Stats.*, *supra* note 17 (“From 2000 through 2006 the Department of Defense never awarded more than three-percent of its contracts to woman-owned small business.”).

⁸⁴ Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243.

⁸⁵ Exec. Order No. 13,157, 3 C.F.R. 272.

⁸⁶ Woman-Owned Small-Business Federal Contract Assistance Procedures, 72 Fed. Reg. 73,285, 73,300 (Dec. 27, 2007) (to be codified at 13 C.F.R. pt. 121, 125, 127, 134) (“The proposed rule allows an agency to set-aside contracts for women-owned small-business only after the agency has found ‘evidence of relevant discrimination in that industry by that agency.’”).

⁸⁷ FAR, *supra* note 41, pt. 19.14.

⁸⁸ U.S. Dep’t of Lab., Office of Small Bus. Programs, Welcome Page, <http://www.dol.gov/osbp/welcome.htm> (last visited July 22, 2008) [hereinafter Small Bus. Programs, Welcome Page]; Exec. Order No. 13,360, 69 Fed. Reg. 206 (Oct. 26, 2004).

⁸⁹ *See* Small Business Act of 1958, Pub. L. No. 85-536-50, 72 Stat. 384; *see also* 13 C.F.R. § 125.11 (2008) (“At time of contract offer, a service-disabled veteran-owned small business (SDVOSB) must fall within the size standard corresponding to the NAICS code. If the contracting officer is unable to verify that the SDVOSB is small, the issue is referred to the Small Business Administration for a formal size determination.”).

⁹⁰ Small Bus. Programs, Welcome Page, *supra* note 88.

⁹¹ *Id.*

A. Status

To receive HUBZone or disadvantaged small business preference, qualifying organizations must certify their status with the Small Business Administration.⁹² In contrast, service-disabled veteran-owned businesses are generally not required to follow such procedures to certify service-disabled status.⁹³ Instead, small businesses owned by service-disabled veterans will register in the government's central contractor registration database prior to participating in a federal contracting program.⁹⁴ A service-disabled veteran-owned small business that fails to follow this procedure may preclude itself from participating in contract competitions reserved exclusively for them.⁹⁵ However, to take advantage of any preference, regardless of the socio-economic program, all small businesses must satisfy existing regulations and be able to provide the government with the products and services it requires.⁹⁶

B. Responsibility Determinations

Responsibility determinations are procedural questions answered by a contracting officer.⁹⁷ The agency contracting officer will determine that the small business has the experience and ability to adequately perform the contract.⁹⁸ If a contracting officer finds a small business not "responsible" during the pre-award process,⁹⁹ the company may be required to obtain a certificate of competency from the Small Business Administration.¹⁰⁰ If the Small Business Administration issues a certificate of competency, then the contracting officer is generally bound by that decision and the acquisition is allowed to proceed.¹⁰¹ After contract award, the "responsible" contractor is required perform in accordance with the terms of the contract.¹⁰²

During its pre-award planning, a small business owned and operated by a service-disabled veteran must ensure that it is capable of performing the work sought, or run the risk of exclusion from competition for future contracts.¹⁰³ Prior to submitting an offer, the service-disabled veteran should recall that his service-disabled status alone does not exempt him from the "responsibility" requirement, regardless of what type of acquisition method the government intends to use in its procurement.¹⁰⁴

⁹² See *Singleton Enters.-GMT Mech., A Joint Venture v. United States*, B-310552, 2008 U.S. Comp. Gen. LEXIS 3 (Jan. 10, 2008) (stating determination of service-disabled veteran-owned small business status is not a matter for the procuring agency but rather a matter reserved exclusively for the Small Business Administration); see also FAR, *supra* note 41, pt. 19.306 ("Small disadvantaged and HUBZone business must certify their status with the SBA prior to receiving a contract preference.").

⁹³ FAR, *supra* note 41, pt. 19.601.

⁹⁴ Veterans Benefit Act of 2003, Pub. L. No. 108-183, 117 Stat. 2662 (codified at 15 U.S.C. § 657f); see also Small Bus. Programs, Welcome Page, *supra* note 88 (stating once entered into the database, a service-disabled veteran-owned small business will complete an on-line representations and certifications application).

⁹⁵ FAR, *supra* note 41, pt. 19.1403.

⁹⁶ *Id.* pt. 19.601.

⁹⁷ *Singleton Enters.-GMT Mech.*, 2008 U.S. Comp. Gen. LEXIS 3 (stating responsiveness is determined at the time of the bid opening); see also FAR, *supra* note 41, pt. 9.105-2(b) (stating the contracting officer must use the documents in the file to determine if the apparent winning offeror is responsible).

⁹⁸ FAR, *supra* note 41, pt. 9.103(b) ("Absent information 'clearly indicating' that the prospective contractor is responsible, the contracting officer [must] make a determination of nonresponsibility."); see also *John C. Grimberg Co., Inc. v. United States*, 185 F.3d 1297 (Fed. Cir. 1999) (stating that a contracting officer must have enough information to make a responsibility determination).

⁹⁹ *Id.* pt. 19.602-1 ("Responsibility factors include, but are not limited to: capacity, capability, competency, credit, integrity, perseverance, tenacity and limitations on subcontracting.").

¹⁰⁰ FAR, *supra* note 41, pt. 19.601(a).

¹⁰¹ *Id.*

¹⁰² *Singleton Enters. -GMT Mech.*, 2008 U.S. Comp. Gen. LEXIS 3, at*2(10 Jan 2008) (citing *B-G Mech. Serv., Inc.*, B-265782 (Dec. 27, 1995)).

¹⁰³ FAR, *supra* note 41, pt. 19.602-1.

¹⁰⁴ *Id.*

C. Acquisition Methods

The 2003 Veterans Benefit Act authorized agency contracting officers to conduct competitive contract set-asides and sole source procurements exclusively among service-disabled veteran-owned small businesses.¹⁰⁵ A contracting officer is authorized to conduct a contract set-aside if he has a reasonable expectation that at least two responsible service-disabled veteran-owned small businesses will compete for the contract,¹⁰⁶ and the contract award could be made at a fair market price.¹⁰⁷ If the contracting officer does not receive at least two acceptable offers from service-disabled veteran-owned small businesses, an award could still be made to a sole offeror.¹⁰⁸ To award a contract on a sole-source basis, the contracting officer must ensure that the sole offeror is “responsible,” and the award can be made at a fair market price.¹⁰⁹ In the case where the agency does not receive acceptable offers from any service-disabled veteran-owned small businesses, competition among all small businesses can be opened.¹¹⁰ With either of these types of acquisitions, the contracting officer should verify the status of the successful offeror before awarding a contract to discourage a competing firm from filing a protest.¹¹¹

D. Protests

On occasion, a service-disabled veteran-owned business engages in a protest.¹¹² Common reasons include status,¹¹³ size determinations, and the acquisition method used by the agency.¹¹⁴ Regulations promulgate procedures to follow when filing a protest.¹¹⁵ An interested party may file its protest with the U.S. Court of Federal Claims of the Government Accountability Office.¹¹⁶ The protestor must ensure that its protest is timely, is in writing, and that it sufficiently describes the allegation of wrongdoing.¹¹⁷

Generally a court will not substitute its judgment for that of the federal agency.¹¹⁸ It may, however, take corrective steps to remedy a problem if the protestor demonstrates that the government’s action was not in accordance with the law and the effect of the agency decision disadvantages the protestor.¹¹⁹ If a court finds agency wrongdoing, a court may set aside the

¹⁰⁵ Veterans Benefit Act of 2003, Pub. L. No. 108-183, 117 Stat. 2662 (codified at 15 U.S.C. § 657f).

¹⁰⁶ See *MCS Portable Restroom Serv.*, B-299291, 2007 U.S. Comp. Gen. LEXIS 51 (Mar. 28, 2007) (stating that there is no particular method of market research to follow but some factors to consider when making a determination if at least two service-disabled veteran-owned small businesses will compete for a contract, are: procurement history, market surveys, and consultation with the agency small business specialist).

¹⁰⁷ FAR, *supra* note 41, pt. 19.14 (“To set-aside an acquisition for competition restricted to service-disabled veteran-owned small businesses (SDVOSB) the contracting officer must have a reasonable expectation that at least two or more SDVOSBs will submit an offer and the contract award can be made at fair market price.”); see also *IBV, Ltd.*, B-311244, 2008 U.S. Comp. Gen. LEXIS 35 (Feb. 21, 2008) (holding agency decision to cancel a set-aside for service-disabled veteran-owned business was unobjectionable after the agency contracting officer conducted market research and determined that the agency would not receive a fair market price from that type of business concern).

¹⁰⁸ *MCS Portable Restroom Serv.*, B-299291, 2007 U.S. Comp. Gen. LEXIS 51 (finding the Veterans Benefit Act of 2003 read together with FAR pt. 19.1406(a), (b) provide an agency contracting officer the discretion to make a sole-source award to a service-disabled veteran-owned small businesses (SDVOSB) where the prerequisites that would allow for a SDVOSB set-aside have not been met).

¹⁰⁹ See FAR, *supra* note 41, pt. 19.14; see also *IBV, Ltd.*, B-311244, 2008 U.S. Comp. Gen. LEXIS 35 (holding that agency decision not to award a contract to a sole service-disabled veteran-owned business was proper when the agency contracting officer conducted market research and determined that it would not receive a fair market price).

¹¹⁰ FAR, *supra* note 41, pt. 19.1406.

¹¹¹ *Id.* pt. 19.1407.

¹¹² *Singleton Enters.-GMT Mech., A Joint Venture v. United States*, B-310552, 2008 U.S. Comp. Gen. LEXIS 3 (Jan. 10, 2007).

¹¹³ *Id.* (determining that the managerial structure of a joint venture involving a service-disabled veteran-owned small business was not a matter for the procuring agency but rather a matter exclusively the Small Business Administration).

¹¹⁴ See *id.* (quoting 13 C.F.R. § 125.24(b) (2006)) (“For competitive set-asides, ‘[a]ny’ interested party [to include contracting officers] may protest the apparent successful offeror’s service-disabled veteran-owned status.”); see also 13 C.F.R. § 125.24 (“In the case of a sole-source acquisition, the Small Business Administration, or an agency contracting officer may protest a service-disabled veteran-owned small business’ status.”).

¹¹⁵ FAR, *supra* note 41, pt. 19.302 (describing how to protest a firm’s small business size representation); see also *id.* pt. 19.307 (describing how-to protest a firm’s representation that it is a service-disabled veteran-owned small business concern).

¹¹⁶ *Knowledge Connections Travel, Inc. v. United States*, 76 Fed. Cl. 6, 2007 U.S. Claims LEXIS 102, at *28–29 (Ct. Fed. Cl., Mar. 28, 2007) (quoting 28 U.S.C. § 1491(b) (2000)) (holding that under the Tucker Act, the United States Court of Federal Claims has jurisdiction to render judgment on a proposed contract before and after contract award, or for an alleged violation of a statute or regulation in connection with a procurement or proposed procurement).

¹¹⁷ FAR, *supra* note 41, pt. 19.307.

¹¹⁸ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

¹¹⁹ *Bannum, Inc. v. United States*, 404 F.3d 1346, 1351 (Fed. Cir. 2005).

agency decision, particularly if the court finds that the agency contracting decision was “arbitrary, capricious, and an abuse of discretion.”¹²⁰

V. Policy Conflicts

At the intersection of socio-economic and agency procurement programs are policy conflicts,¹²¹ which present an immediate challenge to an agency contracting officer.¹²² Contract bundling,¹²³ simplified acquisitions,¹²⁴ and determining priority among the different socio-economic programs are issues that make the task difficult.¹²⁵

A. Contract Bundling

An agency decision to combine several requirements into one solicitation is called consolidation.¹²⁶ Where the government may realize a substantial cost benefit by combining multiple contract requirements into a single award, it may “bundle the contract.”¹²⁷ As a general rule, however, agencies shall avoid “unnecessary” and “unjustified” contract bundling that precludes small businesses from participating as prime vendors.¹²⁸

When an agency decides to bundle a contract without regard to Congress’s intent to promote socio-economic programs, contracting officers should be concerned. In particular, a bundling action taken to avoid full and open competition is patently illegal.¹²⁹ However, no matter what course of action is followed, a tension will always exist between the potential cost savings to the agency and the planned solicitation.¹³⁰ Therefore, contracting officers are often challenged to determine whether to combine contracts requirements into a single award.¹³¹

In addition to the difficulty that exists for contracting officers, agencies considering a consolidation action should recognize the impact that their decision will have on the small business community.¹³² Whether termed “bundling” or

¹²⁰ *Id.* at 35 (quoting Administrative Procedures Act of 1966, 5 U.S.C. § 706).

¹²¹ U.S. GOV’T ACCT. OFF., REPORT TO CONGRESSIONAL REQUESTORS NO. 06-399, INCREASED USE OF ALASKA NATIVE CORPORATIONS’ SPECIAL 8(A) PROVISIONS CALLS FOR TAILORED OVERSIGHT (2006) (finding the policy to assist economically and socially disadvantaged Alaskan natives has resulted in higher priced goods and services paid by the government).

¹²² See Styles Memo, *supra* note 9.

¹²³ Matthew Weinstock, *OMB Orders Agencies to Reduce Bundling*, GovernmentExecutive.com (Oct. 30, 2002), <http://govexec.com/dailyfed/1002/103002w1.htm> (“For every \$100 awarded on a ‘bundled’ contract, there is a \$33 decrease to small businesses.”).

¹²⁴ FAR, *supra* note 41, pt. 13.5.

¹²⁵ Federal Acquisition Regulation: Far Case 2006-034, Socioeconomic Program Priority, 73 Fed. Reg. 12,699 (Mar. 10, 2008) [hereinafter Socioeconomic Program Priority] (“Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have proposed rule changes to the FAR in an effort to resolve the issue of precedent among socio-economic programs.”).

¹²⁶ *Contract Bundling and the Impact on Veteran Owned Small Businesses: Hearing Before the H. Sub. Comm. on Economic Opportunity of the H. Comm. on Veterans’ Affairs*, 111th Cong. (2007) [hereinafter *Contract Bundling and the Impact on Veteran Owned Small Businesses*] (statement of Anthony R. Martocchia, Director, Officer of Small Business Programs Acquisition, Technology and Logistics, U.S. Department of Defense).

¹²⁷ FAR, *supra* note 41, pt. 2.101(b)(1)(i)-(iv).

‘Bundling’ means (1) Consolidating two or more requirements for supplies or services, previously provided or performed under separate smaller contracts, into a solicitation for a single contract that is likely to be unsuitable for award to a small business concern due to (i) The diversity, size, or specialized nature of the elements of the performance specified; (ii) The aggregate dollar value of the anticipated award; (iii) The geographical dispersion of the contract performance sites; or (iv) Any combination of the factors described in paragraphs (1)(i), (ii), and (iii) of this definition.

Id.

¹²⁸ 15 U.S.C. § 631(j)(3) (2000).

¹²⁹ Competition in Contracting Act, 41 U.S.C. § 253a(a).

¹³⁰ *Nautical Eng’g, Inc.*, 2007 U.S. Comp. Gen. LEXIS 211 (Nov. 7, 2007) (holding the U.S. Coast Guard did not improperly bundle a ship maintenance and repair contract when the savings exceeded 10% of the anticipated contract award).

¹³¹ *Id.* (requiring a contracting officer to determine whether multiple awards are appropriate when planning an acquisition for a indefinite delivery/indefinite quantity contract).

¹³² *Contract Bundling and the Impact on Veteran Owned Small Businesses*, *supra* note 126.

“consolidation,” the effect of an improper agency action on service-disabled veteran-owned small business is the same—the number of contracts available to compete for is reduced.¹³³ A multitude of improper agency decisions can culminate to drive small business out of the federal marketplace.¹³⁴ Only when executed correctly will both the government and small business benefit from contract consolidation.¹³⁵

B. Simplified Acquisitions

The Simplified Acquisition Program is another tool available to procurement officials to direct contracting opportunities towards service-disabled veteran-owned small businesses.¹³⁶ Contracting officers may set aside the requirement for consideration among HUBZone and service-disabled veteran-owned small businesses when the estimated value of an agency requirement¹³⁷ is “at or below” the simplified acquisition threshold.¹³⁸ When using simplified acquisition procedures, the contracting officer may award a contract to either a HUBZone or service-disabled veteran-owned small business on a sole source basis.¹³⁹ Generally, a contracting officer’s decision to set aside an acquisition in either of these cases is not reviewable by the Small Business Administration.¹⁴⁰

The Simplified Acquisition Program includes a test program for the purchase of commercial items.¹⁴¹ This test program increases the simplified acquisition threshold from the hundreds of thousands into the millions of dollars¹⁴² and is designed to maximize agency efficiency and economy, while reducing administrative costs.¹⁴³ The program, however, has been widely abused by contracting officers and other procurement officials.¹⁴⁴ The impact of the abuse harms both service-disabled veteran-owned small businesses and other socio-economic programs by redirecting contracting opportunities to larger business concerns.¹⁴⁵

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ 13 C.F.R. § 125.21 (2006).

¹³⁷ FAR, *supra* note 41, pt. 13.003(b)(1). Each acquisition of supplies or services that has an anticipated dollar value exceeding \$3,000 and not exceeding \$100,000 is reserved exclusively for small business concerns and shall be set aside. *Id.*

¹³⁸ 13 C.F.R. § 125.21; *see also* FAR, *supra* note 41, pt. 13.003(b)(2) (“The contracting officer may set aside for HUBZone small business concerns or service-disabled veteran-owned small business concerns an acquisition of supplies or services that has an anticipated dollar value exceeding the micro-purchase threshold and not exceeding the simplified acquisition threshold.”).

¹³⁹ 13 C.F.R. § 125.21. *But cf.* IBV, Ltd., B-311244, 2008 U.S. Comp. Gen. LEXIS 35 (Feb. 21, 2008) (holding that agency decision not to award a contract to a sole service-disabled veteran-owned business was proper when the agency contracting officer conducted market research and determined that it would not receive a fair market price).

¹⁴⁰ FAR, *supra* note 41, pt. 13.003(b)(2) (“The contracting officer’s decision not to set aside an acquisition for HUBZone small business or service-disabled veteran-owned small business concerns participation below the simplified acquisition threshold is not subject to review under FAR Pt. 19.4.”).

¹⁴¹ *Id.* pt. 2.101(b).

Commercial item” means (1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and (i) Has been sold, leased, or licensed to the general public; or, (ii) Has been offered for sale, lease, or license to the general public.

Id.

¹⁴² *Id.* pt. 13.5 (“As a test program, simplified procedures may be used for the acquisition of supplies and services in amounts greater than the simplified acquisition threshold but not exceeding \$5.5 million (\$11 million for acquisitions as described FAR Pt. 13.500(e).”).

¹⁴³ *Id.* pt. 13.5000(d).

¹⁴⁴ U.S. DEP’T OF DEF., OFF. OF THE INSPECTOR GEN., D-2006-115, COMMERCIAL CONTRACTING FOR THE ACQUISITION OF DEFENSE SYSTEMS (29 Sept. 2006).

¹⁴⁵ *Id.*

C. Socio-Economic Program Conflicts

The central contractor registration houses hundreds of thousands of small business's registrations.¹⁴⁶ The Federal Acquisition Regulation does not give specific guidance or make clear the order of precedence a contracting officer should apply to determine socio-economic program priority.¹⁴⁷ Recently, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have proposed amendments to the Federal Acquisition Regulation to effectively resolve this problem.¹⁴⁸ This proposed change is intended to clarify the "relationship among various small business programs with regard to whether one has priority over another for acquisition purposes,"¹⁴⁹ which may impact certain small business contractors.¹⁵⁰ However, the councils believe that when the changes take effect the volume of business in the small business program will remain the same.¹⁵¹

For the service-disabled veteran-owned small business, the proposed changes to the regulations require contracting officers to consider set-asides for service-disabled veteran-owned small businesses before considering a sole source award.¹⁵² In cases where the contracting officer does not receive any acceptable offers from any service disabled veteran-owned small businesses, the set-aside may be withdrawn.¹⁵³ The proposed rule changes are unclear, however, concerning whether the withdrawing of the set-aside precludes a sole source award to a single qualified service-disabled veteran-owned small business.¹⁵⁴ In the meantime, where the prerequisites that would allow for a service-disabled veteran-owned small business set-aside have not been met, contracting officers are advised to follow current law and use their discretion to make a sole-source award to a service-disabled veteran-owned small business.¹⁵⁵

VI. Program Participants

Congress squarely placed the task of ensuring success of the service-disabled veteran-owned small business program on the shoulders of federal agencies.¹⁵⁶ To achieve the 3% goal in the near future, agency officials must take the program lead and administer the program in accord with existing law and regulations.¹⁵⁷ Additionally, to ensure that the service-disabled veteran-owned small business and other socio-economic programs remain vibrant, federal agencies, quasi-governmental organizations,¹⁵⁸ and the business community must all work together.¹⁵⁹

¹⁴⁶ Socioeconomic Program Priority, *supra* note 125 (stating that as of March 2008 there are 313,512 small business firms; 13,000 HUBZone firms; 9,947 8(a) firms and 9,614 service-disabled veteran-owned firms).

¹⁴⁷ *Id.* (proposing rules to determine the relationship among small business programs).

¹⁴⁸ *Id.* (ensuring that proposed rules changes are in accord with the Small Business Administration's interpretation of the rules and its regulations).

¹⁴⁹ *Id.* (stating the change may have a significant economic impact on a significant number of small business programs). "The proposed rule changes would create an order of precedence for 8(a), HUBZone, and service-disabled veteran-owned businesses." *Id.*

¹⁵⁰ *Id.* (determining that depending on what side of the new rule they fall some small business contractors will gain contracts and others will lose them).

¹⁵¹ *Id.*

¹⁵² *Id.* (proposing changes to FAR pt. 191405(b)).

¹⁵³ *Id.* (proposing changes to FAR pt. 191405(c)).

¹⁵⁴ See MCS Portable Restroom Serv., B-299291, 2007 U.S. Comp. Gen. LEXIS 51 (Mar. 28, 2007) (finding The Veterans Benefit Act of 2003 read together with FAR pt. 19.1406(a), (b) provide an agency contracting officer the discretion to make a sole-source award to a service-disabled veteran-owned small businesses (SDVOSB) where the prerequisites that would allow for a SDVOSB set-aside have not been met).

¹⁵⁵ *Id.*

¹⁵⁶ Exec. Order No. 13,360, 69 Fed. Reg. 206 (Oct. 26, 2004).

¹⁵⁷ See Styles Memo, *supra* note 9.

¹⁵⁸ Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233 (directing the creation of the National Veterans Business Development Corporation).

¹⁵⁹ See Styles Memo, *supra* note 9.

A. The Role of Federal Agencies

Executive Order 13,360 directs federal agencies to develop a strategic plan to further Congress's policies to assist service-disabled veteran-owned businesses.¹⁶⁰ In the order, the President instructed agency heads to designate a senior level agency official responsible to implement the strategic plan.¹⁶¹ In carrying out this duty, the responsible agency official monitors strategic plan compliance and works diligently towards meeting stated goals.¹⁶² To encourage maximum competition among service-disabled veteran-owned small businesses, the agency official must encourage contracting officers to use contract set-asides and sole-source procurements where appropriate.¹⁶³ To encourage prime contractors to sub-contract with service-disabled veteran-owned small businesses, the responsible agency official should ensure that agency sub-contracting plans are developed and closely monitored.¹⁶⁴ Finally, to make businesses aware of the strategic plan, the senior agency official must educate both contractors and other interested parties on the applicable law.¹⁶⁵ An organization that assists government agencies, large business, and service-disabled veterans to accomplish these tasks is the National Veterans Business Development Corporation.

B. The Role of the National Veterans Business Development Corporation

The Veterans Entrepreneurship and Small Business Act of 1999 created the National Veterans Business Development Corporation.¹⁶⁶ Founded in 2001, the National Veterans Business Development Corporation is a non-profit, quasi-governmental organization headed by a board of directors chosen by the President of the United States.¹⁶⁷ The mission of the National Veterans Business Development Corporation is to identify, to unite veteran-owned businesses, and to promote to industry the advantage of doing business with service-disabled veterans.¹⁶⁸ In addition to direct assistance, the National Veterans Business Development Corporation also advocates and strengthens veteran-owned businesses through lobbying efforts at both the state and federal levels.¹⁶⁹ Finally, the National Veterans Business Development Corporation provides veterans with advice and counsel to start, resource, develop and grow a small business.¹⁷⁰ With the creation of the National Veterans Business Development Corporation, veterans aspiring to start a small business have a resource to help them to succeed as small business owners and therefore, industry is better equipped to partner with them.¹⁷¹

C. The Role of the Industry

Federal agencies and veteran-owned small businesses depend on their prime contractors and other small business to meet the service-disabled veteran-owned small business program contracting goals.¹⁷² Depending on the type of work to be performed under the contract, a service-disabled veteran-owned small business performing as a prime contractor may subcontract a certain portion of its business to other small businesses.¹⁷³ Large businesses acting as a prime contractor

¹⁶⁰ Exec. Order No. 13,360, 69 Fed. Reg. 206 (2006).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ 13 C.F.R. §§ 125.19, 125.20 (2008).

¹⁶⁴ *Id.* §§ 125.2, 125.3.

¹⁶⁵ Exec. Order No. 13,360, 69 Fed. Reg. 206.

¹⁶⁶ Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233.

¹⁶⁷ Veteranscorp.org, About the Veterans Corporation, <http://www.veteranscorp.org/AboutTVC.aspx> (last visited July 29, 2008) [hereinafter About the Veterans Corporation] ("Board members are chosen [by the President] because of their experience, knowledge and expertise they possess within both business and veteran's issues.").

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50.

¹⁷¹ *Id.*; see also *Ironclad/EEI, A Joint Venture v. United States*, 78 Fed. Cl. 351 (Ct. Fed. Cl., Sept. 26, 2007) (stating a joint venture between a service-disabled veteran-owned small business and large businesses lacked standing to contest a Small Business Administration determination that it exceeded size limitations).

¹⁷² 2 DEFENSE CONSULTING AND OUTSOURCING I (Sept. 2006), <http://www.defense-consulting-outsourcing.com/article.cfm>.

¹⁷³ See *id.* ("For construction contracts a service-disabled veteran-owned business must perform at least 15% of the work. In the case of services, the firm will complete at least 50% of the work. Finally, contracts involving supplies, at least 50% of the cost of manufacturing the items (not including labor).")

contributes to the success of the service-disabled veteran small business program through subcontracting.¹⁷⁴ In either case, subcontracting plans are the most direct method to ensure that service-disabled veteran-owned small businesses obtain a fair proportion of agency contracts.¹⁷⁵ As a cautionary measure, agency contracting officers are encouraged to develop a subcontracting plan into any solicitation in order to avoid potential protest from small business concerns, thus potentially spoiling the goodwill created within the alliance between large businesses and service-disabled veteran-owned small businesses.¹⁷⁶

Another method for service-disabled veterans to effectively and equitably compete with large industry for an agency contract is to form a joint venture.¹⁷⁷ A service-disabled veteran-owned small business may enter into a joint venture with another small business provided the business arrangement is controlled and managed by the service-disabled veteran.¹⁷⁸ The service-disabled veteran-owned small business should be aware that to retain a contract preference he may not enter into a joint venture agreement with a large business.¹⁷⁹

VII. Conclusion

Federal agencies have failed to comply with Congress's intent with respect to the service-disabled veteran-owned small businesses program.¹⁸⁰ To meet statutory guidelines, personnel involved in the procurement process must continue to work diligently within the boundaries of the law.¹⁸¹ However, if the goal of awarding at least 3% of all federal contracts to service-disabled veteran-owned small businesses does not develop into a statutory benchmark, it will always remain just an aspiration.¹⁸² To encourage compliance, Congress may consider assessing a monetary penalty or sanction on federal agencies.¹⁸³

Penalties and sanctions aside, to increase federal contracting opportunities for service-disabled veteran-owned small businesses, agencies must faithfully implement their strategic plans, responsibly use simplified acquisitions procedures, appropriately bundle contracts, effectively adhere to subcontracting plans, and partner accordingly with large and small businesses,¹⁸⁴ quasi-governmental organizations and veterans.¹⁸⁵ Only when these and other similar tasks are accomplished, will the true spirit and intent of the law—recognition of the sacrifices of service-disabled veterans—be finally achieved.

¹⁷⁴ See 13 C.F.R. 125.3 (2008) (describing subcontracting assistance in-general).

¹⁷⁵ See *id.* (describing the purpose of subcontracting plans is to provide maximum subcontracting opportunities for all small businesses concerns).

¹⁷⁶ See *Nautical Eng'g, Inc., 2007 U.S. Comp. Gen. LEXIS 211 (Nov. 7, 2007)* (“U.S. Coast Guard required the successful offeror to establish and maintain a mentoring or partnership agreement with at least two small firms and to contract out not less than 25% of its orders for ship repair and maintenance to small businesses.”).

¹⁷⁷ FAR, *supra* note 41, pt. 19.4.

¹⁷⁸ *Singleton Enters.-GMT Mech., A Joint Venture v. United States, B-310552, 2008 U.S. Comp. Gen. LEXIS 3 (Jan. 10, 2007)* (citing 13 C.F.R. § 125.15(b) (2006) and FAR pt. 19.1403(c) (2007)) (stating service-disabled veteran must control the joint venture).

¹⁷⁹ *Id.* (quoting 13 C.F.R. § 125.15(b)) (“A service-disabled veteran-owned small business (SDVOSB) may enter into a joint venture with one or more other [small business concerns] for the purpose of performing a (SDVOSB) contract.”).

¹⁸⁰ Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233; Veterans Benefit Act of 2003, Pub. L. No. 108-183, 117 Stat. 2662 (codified at 15 U.S.C. § 657f); Veterans Benefit, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461 120 Stat. 3403.

¹⁸¹ *Id.*

¹⁸² *DOD Goals & Stats., supra* note 17.

¹⁸³ Transp. Security Agency, Small & Disadvantaged Bus. Office, Small Business Policy, Subcontracting Incentive Program, pt. 3.6.1.10.3 (2007), available at http://www.tsa.gov/join/smallbiz/smallbiz_policy.shtm (stating the Transportation and Security Agency may utilize positive incentives to the maximum extent practicable, and devise monetary penalties, for prime contractors who fail to meet stated goals).

¹⁸⁴ Press Release, ARINC, “Industry Day” at ARINC Launches Regional Effort to Recruit Veteran-Owned Businesses for DOD Supply Chain (Jan. 22, 2008), <http://www.arinc.com/news/2007/10-25-07.html>.

¹⁸⁵ 48 C.F.R. §§ 5.002 (a), (c) (2002).

Contracting officers must publicize contract actions in order to (a) increase competition; (b) broaden industry participation in meeting Government requirements; and, (c) assist small business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns, and women-owned small business concerns in obtaining contracts and subcontracts.

Id.